



MERIT SYSTEMS PROTECTION BOARD

Notice of Opportunity to File Amicus Briefs

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: The Merit Systems Protection Board (MSPB or Board) announces the opportunity to file amicus briefs in the matter of *Barbara R. King v. Department of the Air Force*, MSPB Docket Number DA-0752-09-0604-P-1, currently pending before the Board on interlocutory appeal. The administrative judge certified for interlocutory review the question of whether the provisions of the Whistleblower Protection Enhancement Act of 2012 (WPEA), 112 Public Law 199, with regard to damages may be applied retroactively to cases pending prior to its effective date.

Of particular relevance in *King* is the question of the retroactive effect of section 107(b) of the WPEA, which addresses damages available to individuals who have suffered reprisal for protected disclosures or activities. Prior to enactment of the WPEA, the corrective action available to such individuals under the Whistleblower Protection Act (WPA) included reasonable and foreseeable consequential damages, but not compensatory, or non-pecuniary, damages. See *Bohac v. Department of Agriculture*, 239 F.3d 1334, 1337-43 (Fed. Cir. 2001). However, under section 107(b) of the WPEA, corrective action may also include “compensatory damages (including interest, reasonable expert witness fees, and costs).” Therefore, the Board must determine in *King* whether to apply

the WPEA standard or the WPA standard in determining what corrective action is available in appeals pending prior to the effective date of the WPEA.

In *King*, the appellant's protected disclosures and the agency's retaliatory personnel action occurred in 2009. The appellant filed her initial Board appeal in 2009, and the administrative judge issued an initial decision on October 3, 2012, finding, in relevant part, that the appellant established reprisal for whistleblowing. The initial decision became the final decision of the Board on November 7, 2012, after neither party filed a petition for review. The appellant filed her request for compensatory damages on December 17, 2012. The WPEA was enacted on November 27, 2012, and became effective on December 27, 2012.

Interested persons or organizations may submit amicus briefs or other comments on the question presented in *King* no later than April 12, 2013. Amicus briefs must be filed with the Clerk of the Board. Briefs shall not exceed 30 pages in length. The text shall be double-spaced, except for quotations and footnotes, and the briefs shall be on 8 ½ by 11 inch paper with one inch margins on all four sides. All amicus briefs received will be posted on the Board's website at www.mspb.gov/SignificantCases.

DATES: All briefs submitted in response to this notice must be received by the Clerk of the Board on or before April 12, 2013.

ADDRESSES: All briefs shall be captioned "*Barbara R. King v. Department of the Air Force*" and entitled "Amicus Brief." Only one copy of the brief need be submitted. The Board encourages interested persons and organizations to submit amicus briefs as attachments to electronic mail addressed to

mspb@mspb.gov. An email should contain a subject line indicating that the submission contains an amicus brief in the *King* case. Any commonly-used word processing format or PDF format is acceptable; text formats are preferable to image formats. Briefs may also be filed with the Office of the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419; fax (202) 653-7130.

FOR FUTHER INFORMATION CONTACT: Molly Leckey, Merit Systems Protection Board, Office of the Clerk of the Board, 1615 M Street, NW, Washington, DC 20419; (202) 653-7200; mspb@mspb.gov.

William D. Spencer

Clerk of the Board

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